Nos. 83-997, 83-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

STEPHEN A. BOKAT
Counsel of Record
ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the amicus curiae Chamber of Commerce of the United States of America

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States moves for leave to file the attached brief *amicus curiae* in support of the petitioner, Trans World Airlines, Inc. We file this motion pursuant to Supreme Court Rule 36.3 because the individual respondents, Harold H. Thurston,

Christopher J. Clark and C. A. Parkhill declined to consent to the filing of the *amicus* brief.

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business and professional organizations in the United States. Chamber membership currently exceeds 200,000, and includes over 195,000 corporations, partnerships and proprietorships as well as over 3,900 trade associations, and state and local chambers of commerce. The Chamber regularly represents the interests of its members in litigation of issues of national concern to the American business community, and, in fact, filed an *amicus curiae* brief in support of the Petition for Certiorari in case No. 83-997.[1]

The issues in this case are of particular interest to Chamber members and to all American companies regulated by the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 (1982). Many of the Chamber's member companies employ workers within the class of employees protected by the ADEA. The Chamber, therefore, is concerned that employers who make non-age related accommodations for employees need not also be required to make age-related accommodations; that the standard of liability under the ADEA not be construed so broadly as to eliminate the requirement of specific intent to establish a "willful" violation of the ADEA; and that labor unions which violate the ADEA should be liable for monetary relief.

As the principal voice of the American business community, the Chamber is well-suited to present the broad interest of business in this case. The Chamber believes it is important for this Court to recognize the significance

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[1] *See, e.g., Environmental Protection Agency* v. *Natural Resources Defense Council, Inc., cert. granted,* 52 U.S.L.W. 3791 (U.S. May 1, 1984); *Bowen* v. *U.S. Postal Service,* —— U.S. ——, 74 L.Ed. 2d 402 (1983); *First National Maintenance Corp.* v. *NLRB,* 452 U.S. 666 (1981).

of these issues to business as a whole and, therefore, respectfully requests leave to file the attached brief.

Respectfully submitted,

STEPHEN A. BOKAT
Counsel of Record
ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief Amicus Curiae for a statement of its interest in this proceeding.

INTRODUCTION

This case arises out of the Federal Aviation Administration's ("FAA") requirement that commercial airline pilots cease serving in that capacity after age 60.[1] 14 C.F.R. § 121.383. Prior to the 1978 amendments to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 (1982), Trans World Airlines, Inc. ("TWA"), like the rest of the airline industry, required all cockpit crewmembers to retire at age 60. This was consistent with the ADEA.[2]

Following passage of the 1978 amendments to the ADEA, TWA determined that changes would have to be made in order to comply with the statute. (J.A. 1046-47, 1050-51). Over the objections of the Air Line Pilots Association ("ALPA"), TWA instituted a new policy providing that any cockpit crewmember in flight engineer status at age 60 could not be compelled to retire. (J.A. 425). Transfers from pilot to flight engineer status were to be governed by the collective bargaining agreement (J.A. 425).

Soon thereafter, TWA was sued in separate actions both by ALPA and by a group of pilots. ALPA claimed that allowing anyone to work in the cockpit after age 60 violated the collective bargaining agreement and the Railway Labor Act, 45 U.S.C. 151 (1972) (J.A. 108-15).[3] The plaintiffs in the instant case were pilots who had been retired at age 60 when there were no flight engineer vacancies available prior to their 60th birthdays. It was established that 83% of the pilots seeking to downgrade to flight engineer positions at age 60 have been successful in doing so. (A-61 n.8).

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[1] It is not the Chamber's intention to provide a detailed restatement of the facts or the proceedings below. For such a recitation the Chamber respectfully refers the Court to petitioner, Trans World Airlines' Statement of the Case.

[2] *See United Airlines* v. *McMann*, 434 U.S. 192 (1977).

[3] This suit was ultimately dismissed by the district court (A-50-54), and that ruling was affirmed on appeal. (A-13-21).

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Second Circuit held in the instant case that TWA violated the ADEA by requiring pilots approaching age 60 to bid for positions as flight engineers, although a similar bidding requirement was not imposed on pilots becoming flight engineers because of health conditions. That holding ignores several key factors: Pilots downgrading because of health conditions were treated the same regardless of their age; only two pilots ever downgraded due to health considerations; and 83% of age 60 pilots were able to obtain positions as flight engineers through the seniority system's bidding procedures.

The duty of accommodation imposed by the Second Circuit is far in excess of any intended by Congress when it amended the ADEA in 1978. The statute and its legislative history are clear that employers are under no duty to provide special treatment to employees between ages 40 and 70.

Even if this Court finds that TWA violated the ADEA, it should reject the Second Circuit's conclusion that the violation was willful. The record is clear that TWA took the actions giving rise to this case in a good faith effort to comply with the 1978 amendments to the ADEA. The Second Circuit's conclusion appears to make any violation willful if it is not accidental or negligent. The Chamber believes this conclusion is inconsistent with both the plain meaning of the term "willful" and Congressional intent to establish two levels of liability under the Act. The Chamber urges this Court to adopt a specific intent standard of willfulness such as that adopted by the U.S. Court of Appeals for the First Circuit in *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1979), and the Seventh Circuit in *Syvock* v. *Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149 (1981).

The Chamber additionally urges this Court to reject the Second Circuit's ruling that under the ADEA unions are exempt from monetary liability. The Second Circuit

originally imposed such liability, but then, without explanation, it amended its opinion to delete the imposition of monetary liability. Imposition of monetary liability on labor organizations is consistent with the ADEA itself, as well as its legislative history. Moreover, it is consistent with the practice under other labor statutes.

ARGUMENT

I. THE HOLDING OF THE MAJORITY BELOW IMPOSES BURDENS ON EMPLOYERS FAR BEYOND ANY INTENDED BY CONGRESS WHEN IT PASSED THE ADEA.

A majority of the court below reversed the district court's dismissal of the case and held that TWA had violated the ADEA by requiring that pilots approaching age 60 bid for positions as flight engineers prior to their 60th birthdays and retire if no position was available. The majority's holding is based on its view that TWA "routinely accommodates" pilots downgrading for non-age reasons. (A-30). In this regard, the majority noted that TWA captains who were unable to remain in that position due to a medical condition could downgrade to a flight engineer's position "without being required to bid for the position." (A-10).

What the majority mistakenly ignores, however, is that any of the plaintiffs, prior to turning age 60, could downgrade to a flight engineer's position in the same manner as a younger pilot if a medical condition had necessitated them doing so. As Judge Van Graafeiland notes in dissent, the majority's finding of discrimination based on a comparison of the procedures for downgrading because of the FAA age bar, and the procedure for downgrading because of an adverse medical condition, is "like comparing apples with oranges." (A-35 to A-36).[4]

[4] In stating why he felt this was an unfair comparison, Judge Van Graafeiland noted:

> "A pilot does not know in advance that he is going to break his leg or that company economics will eliminate the job he is performing. However, a pilot knows the exact date on which he will become 60 years of age and that after that date, FAA regulations will no longer permit him to work as a pilot." (A-36).

The Second Circuit's finding of discrimination based on the comparison of the different downgrading procedures is made all the more strange in view of the fact that no more than two pilots have reverted to flight engineer positions because of medical conditions (J.A. 968), and that 83% of pilots attempting to downgrade in order to continue working after age 60 have been successful in that regard. Rather than being based on a rational interpretation of the ADEA, the majority's conclusions appear to be based at least in part on its dislike of the FAA's age 60 rule. This is apparent from the majority's gratuitous observation that the FAA does not apply the age 60 rule to its own pilots. (A-18). The validity of the FAA requirement, however, is not disputed here. The simple fact is that TWA, like all major airlines, must comply with the rule, and TWA's actions here were taken in a good faith effort to comply with the rule, the 1978 amendments to the ADEA, and the working agreement.

The Chamber submits that TWA's accommodation was reasonable under the circumstances. The rationale of the Fifth Circuit in rejecting a claim of pregnancy discrimination under Title VII of the Civil Rights Act of 1964 is relevant here. As the Supreme Court cautioned in *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 578 (1978), courts are "generally less competent than employers to restructure business practices."

In sum, the Chamber believes the Second Circuit has imposed a duty of accommodation far in excess of anything contemplated by Congress when it amended the ADEA. TWA has posited a valid, non-discriminatory business reason for the requirements imposed on pilots approaching age 60. The majority's order, in essence, requires TWA to create positions where none exists. The

ADEA does not require such special treatment. As Judge Van Graafeiland, the dissenter here, stated for the majority in an earlier Second Circuit opinion:

> The ADEA does not require an employer to accord special treatment to employees over forty years of age . . . . It requires, instead, that an employee's age be treated in a neutral fashion, neither facilitating nor hindering advancement, demotion, or discharge.

Parcinski v. *Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, —— U.S. ———, 75 L.Ed. 2d 950 (1983). *Accord, e.g., Cova* v. *Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978) ("The act does not require that advanced age and substantial length of service entitle employees to special favorable consideration"); *Pirone* v. *Home Ins. Co.*, 559 F. Supp. 306, 311 (S.D.N.Y. 1983) ("The act does not require that employees 40 years of age or older be given a preference"); *Reilly* v. *Friedman's Express, Inc.*, 556 F. Supp. 618, 621 (M.D. Pa. 1983) (The ADEA "does not mandate special treatment be accorded those within the protected group").

II. THE DECISION BELOW FAILS TO DISTINGUISH WILLFUL FROM NON-WILLFUL CONDUCT AND ALLOWS FOR AUTOMATIC AWARDS OF DOUBLE DAMAGES.

A. The Decision Below Ignores The Plain Meaning Of "Willful" And Defeats Congressional Intent To Establish A Two-Tiered Level Of Liability Under The ADEA.

Section 7(b) of the ADEA authorizes the recovery of liquidated or double damages "*only* in cases of *willful* violations" of the Act. 29 U.S.C. § 626(b) (emphasis added). In the decision below, the Second Circuit broadly interprets the term "willful" and holds that in discriminatory treatment cases plaintiffs need not prove a specific intent to violate the ADEA. According to the Second

Circuit, "it is sufficient to establish that the employer either knew of or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (A-33).

The Chamber is concerned that this broad standard for determining liability under the ADEA automatically makes "willful" all acts that are not accidental or negligent. Such a broad standard of "willfulness" is based on the faulty logic that "an employer's actions, if taken *because* of an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason." (A-34) (emphasis in the original). According to this logic, a finding of willfulness would necessarily follow in every ADEA disparate treatment case. The Chamber believes that this result is inconsistent with both the plain meaning of the term "willful" and Congress' intent to establish two levels of liability under the Act.

The plain meaning of § 7(b) denotes two levels of liability under the ADEA. Under this two-tiered approach, double damages are recoverable only when discrimination is willful. Actual damages are the appropriate remedy for non-willful discrimination. The fact that Congress provided for special remedies in the case of willful violations implies that employees can recover for accidental and unintentional violations as well as for deliberate violations of the ADEA. Yet, under the standard applied by the majority below, there can be no unintentional or innocent reason for an employer's action if taken because of age. By failing to distinguish willful from non-willful conduct, the Second Circuit ignores the plain meaning of the term "willful" and defeats congressional intent to establish a two-tiered level of liability under the ADEA.

It is undisputed that TWA revised its retirement policy vis-a-vis flight engineers in an effort to *comply* with, not to avoid, the 1978 amendments to the ADEA. These amendments raised the mandatory retirement age from

60 to 70. TWA changed its retirement policy in response to these amendments so that "any cockpit crew member who [was] in a Flight Engineer status at age 60 may not be compelled to retire." (A-9). Rather than violate the law, TWA was attempting to conform its retirement policy with changes in the law. But instead of being commended for its efforts, TWA was sued both by ALPA for allowing anyone to serve in the cockpit beyond age 60 and by several TWA captains who had to retire at age 60 because there were no flight engineer vacancies. Furthermore, the majority below found TWA to be in willful violation of the Act even though it was sued by one group for going too far and by another group for not going far enough in its attempt to comply with the ADEA. That holding is particularly absurd when viewed in the light of the fact that 83% of the retiring pilots were able to obtain positions as flight engineers.

The Chamber believes that the Second Circuit's approach to liquidated damages is wrong because it automatically makes "willful" all discriminatory actions that are based on age and thereby defeats Congress' intent to establish two levels of liability under the ADEA. The legislative history of § 7(b) of the ADEA supports a two-tiered approach to finding liability under the ADEA. Senator Javits, a co-sponsor of the original 1967 statute, characterized the civil liquidated damages provision of the ADEA as a punitive counterpart to the criminal sanctions provision of the Fair Labor Standards Act.[5] A stricter view of the scienter standard for a willful violation therefore is consistent with legislative recognition of providing a more severe sanction for employers who willfully violate the ADEA.

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[5] ". . . [*T*]*he* [*FLSA's*] *criminal penalty in cases of willful violations has been eliminated and a double damage liability substituted.* This will furnish an effective deterent to willful violations and at the same time avoid difficult problems of proof which would arise under a criminal provision." 113 Cong. Rec. 7076. (daily ed. March 16, 1967) (emphasis in the original).

B. A Specific Intent Standard Avoids Automatic Awards Of Double Damages And Is Consistent With Congressional Intent.

According to the standard for willfulness adopted by the majority below, an employer may be liable for double damages even though he did not know his actions were illegal. The Chamber believes that this standard is unfair and urges this Court to adopt a specific intent standard similar to the one established by the First Circuit in *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1979) and Seventh Circuit in *Syvock* v. *Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149 (1981).

In *Loeb*, the First Circuit defined a violation of the ADEA as willful if "done voluntarily and intentionally and with the specific intent to do something the law forbids, that is to say, with bad purpose either to disobey or disregard the law." 600 F.2d at 1020 n.27, *quoting* E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977). In *Syvock*, the Seventh Circuit held that "the standard of willfulness . . . should focus on the defendant's state of mind at the time the alleged discriminatory act occurred" and "that a finding of willfulness should lie only if there is some showing as to the defendant's knowledge of the legality of his actions." 665 F.2d at 155. Both Circuits therefore look at the purpose of an employer's actions to determine whether it was willful.

The majority below, on the other hand, adopts a much lower standard for determining willfulness. The Second Circuit test allows a recovery of double damages whenever an employee can prove that "an employer's action . . . [was] taken *because* of . . . age . . ." (A-34). This test allows for automatic awards of double damages and, consequently, is inconsistent with congressional intent to establish two levels of liability under the ADEA.

A specific intent standard for determining willfulness would eliminate automatic awards of double damages and be consistent with congressional intent. While Congress did not intend that liquidated damages be awarded for every violation of the ADEA, by providing for such damages Congress did not intend that they never be awarded. By requiring proof of the defendant's state of mind to establish a "willful" violation of the ADEA, this Court would strike an appropriate balance between these two countervailing concerns and ensure that an award of liquidated damages is an exceptional, rather than an automatic, remedy. The Chamber therefore urges this Court to adopt the strict, specific intent standard for "willful" violations of the ADEA, rather than the Second Circuit's standard which makes awards of double damages automatic in a disparate treatment case.

III. LABOR ORGANIZATIONS THAT VIOLATE THE ADEA SHOULD BE LIABLE FOR MONETARY RELIEF.

Assuming this Court finds that TWA and ALPA violated the ADEA, the Chamber believes there is strong support for the proposition that ALPA should share in the monetary liability. In fact, in its initial opinion, the Second Circuit held that the plaintiffs in this action could recover back pay from the union as well as from the employer. In this regard, the court originally held:

> [Plaintiffs] are entitled to recover back pay, an equitable remedy, against the union. *Equal Employment Opportunity Commission v. Air Line Pilots Association, Int'l.*, 489 F. Supp. 1003, 1008-10 (D. Minn. 1980) *rev'd. on other grounds*, 661 F.2d 90 (8th Cir. 1981). The union owes a duty to all its members, including its over-60 members, not to discriminate against them. See, *Steele* v. *Louisville & Nashville Railroad*, 323 U.S. 192 (1944). One of the purposes of a back pay award is to spur unions, as well as employers, to evaluate employment practices

> and eliminate unlawful discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

(A-34-35).

Although petitions for rehearing were denied, the Second Circuit subsequently deleted those portions of its opinion where it imposed monetary liability on the union. (A-38-39). The Second Circuit provided absolutely no rationale for its action.

There is no question that the Second Circuit viewed the union as culpable. In this regard, the majority below specifically held that the union sought "to use the ADEA to cut off the right of the older flight engineers." (A-20). The court also said that the union "actively campaigned to persuade TWA to retain its age-60 retirement policy for all flight deck positions, opposed TWA's unilateral action to attempt partial compliance with the ADEA and induced TWA to impose further discriminatory restrictions on captains seeking to downbid to flight engineer status . . ." (A-32-33).

The Second Circuit's unexplained waiver of union liability for monetary relief contradicts the plain language of the statute. Section 4(c) of the ADEA, 29 U.S.C. § 623, makes it illegal for a union to take any action which adversely affects an employee because of his or her age. And the remedial provision of the statute, section 7(b), 29 U.S.C. § 626(b), provides in relevant part that "court[s] shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of the Act . . . ."

That Congress intended unions to be responsible for their actions is further buttressed by the legislative history of the 1978 amendments to the ADEA. For example, during consideration of the 1978 amendments, Congressman Findley stated:

> The AFL-CIO wants union leadership to keep mandatory retirement as an issue for negotiation during

> collective bargaining. Union leaders argue that because they represent a majority of the workers, mandatory retirement would therefore be a majority decision. But a majority should never be permitted to impose injustice on even a small minority. Unions cannot bargain away the rights of blacks or women —why older citizens?

123 Cong. Rec. H 9348 (daily ed. Sept. 13, 1977).

And, Congressman Hillis expressed agreement with an article he inserted in the hearing record from the newsletter of the American Association of Retired Persons which states in pertinent part:

> Myth: Unions should have the right to use a mandatory retirement age as a "bargaining chip" in collective bargaining with management.
>
> Reality: Unions are prohibited from discrimination on the basis of race, religion or sex and collective bargaining. Why should they be allowed to practice age discrimination by bargaining away a person's opportunity to earn a livelihood merely because of age? In recent months several unions—including the United Steelworkers of America—have made important strides toward flexible retirement policies for their members. We hope that their colleagues in organized labor will see the wisdom of this approach.

123 Cong. Rec. H 9970 (daily ed. Sept. 23, 1977).

It is incomprehensible that Congress would express this type of concern over union compliance with the ADEA, but not intend union liability for losses caused by its noncompliance. *See EEOC* v. *ALPA*, 489 F.Supp. at 1009.[6] As recently as last term, this Court recognized that if unions are not made to share in the monetary liability resulting from their illegal acts, they will have little motivation to comply with their statutory respon-

[6] *Contra Neuman* v. *Northwest Airlines*, 28 FEP Cases 1488 (N.D. Ill. 1982).

sibilities. *Bowen* v. *U.S. Postal Service*, —— U.S. ——, 74 L. Ed. 2d at 416 (1983). In *Bowen*, a fair representation case, this Court stated: "In the absence of damages apportionment where the default of both parties contributed to the employee's injury, incentives to comply with the grievance procedure will be diminished."[7]

Back pay awards against unions have also been consistently imposed under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 (1972). For example, unions which violate § 8(b)(2) of the NLRA by causing an employer to discriminate against employees by encouraging or discouraging union membership have been held by the National Labor Relations Board to be entirely liable for the back pay when it was necessary to do so in order to make the injured employees whole. 29 U.S.C. § 158(b)(2). In *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 54-55 (1953), this Court emphatically rejected the argument that it would not effectuate NLRA policies to require the union "to reimburse back pay if the employer is not made to share this burden. . . ."

Imposition of monetary liability on the unions under the ADEA is also consistent with the practice under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1981). Courts uniformly have held under Title VII that unions must share monetary liability with employers.[8] The same result should obtain under the ADEA.

[7] *Bowen* was a refinement of this Court's holding in *Vaca* v. *Sipes*, 386 U.S. 171, 197 (1967), that the "governing principle . . . is to apportion liability between the employer and the union according to the damage caused by the fault of each."

[8] *See, e.g., Sears* v. *Atkinson, Topeka, and Santa Fe Railway*, 645 F.2d 1365, 1374-77 (10th Cir. 1981), *cert. denied* 456 U.S. 964 (1982); *Donnell* v. *General Motors Corp.*, 567 F.2d 1292, 1300 (8th Cir. 1978); *Allen* v. *Amalgamated Transit Union, Local 788*, 554 F.2d 876, 881 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977); *Rogers* v. *International Paper Co.*, 526 F.2d 722, 723 (8th Cir. 1975). See also, Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 706 (1980).

For these reasons, the Chamber believes that imposition of monetary liability is consistent with the ADEA, other labor statutes, and our national labor policy. Moreover, there is no inequity in imposing monetary liability on a party found to be directly responsible for a statutory violation where (1) the statute expressly imposes a duty to comply, and (2) the statute provides that the court may "grant such legal or equitable relief as may be appropriate to effectuate the purposes of the Act . . ." 29 U.S.C. § 626(b).

CONCLUSION

For the foregoing reasons, the Chamber of Commerce respectfully urges this Court to find that TWA did not violate the ADEA. If this Court should find TWA in violation of the ADEA, the Chamber respectfully urges that it find that the violation was not willful, and that the union must share in the monetary liability arising from the violation.

Respectfully submitted,

STEPHEN A. BOKAT
Counsel of Record
ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the amicus curiae Chamber of Commerce of the United States of America